No. 19-351

In The
Supreme Court of the United States

FEDERAL REPUBLIC OF GERMANY,
A FOREIGN STATE, AND STIFTUNG
PREUSSISCHER KULTURBESITZ, AN
INSTRUMENTALITY OF A FOREIGN STATE,

Petitioners,

v.

ALAN PHILIPP, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether suits concerning property taken as part of the Holocaust are within the expropriation exception to the Foreign Sovereign Immunities Act of 1976 ("FSIA"), which provides jurisdiction over suits concerning property taken in violation of international law. 28 U.S.C. § 1605(a)(3).

2. Whether a foreign state may assert a comity defense that is outside the FSIA's "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state."

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STATEMENT OF THE CASE

I. Introduction

After five years of tiptoeing around an increasing distortion of the Holocaust to avoid Plaintiffs' claims, the current petition by the Federal Republic of Germany ("Germany") and the Stiftung Preussischer Kulturbesitz ("SPK") finally tips their hand. Germany seeks nothing less than sovereign immunity for property taken as part of the Holocaust—not for this case, but for *every* case. To reach that goal Germany and the SPK wave off the justiciability of the Nazis' treatment of "their own nationals within their own territory" (Petition, 2). That treatment of Germany's "own nationals within [its] own territory" is known by another name, a term coined to grapple with the world war that *this* petitioner started that killed more than 80 million people: genocide.[1] The Holocaust was not a domestic matter.

Ever since defeating Germany in World War II, the United States and its allies have shown steadfast support to Holocaust victims seeking recompense for property crimes that occurred because of Nazi persecution. When the Allies occupied a vanquished Germany, they created a legal presumption that transactions between January 30, 1933 and May 8, 1945 involving members of groups that were "to be eliminated in [their] entirety from the cultural and economic life of Germany" under

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[1] Germany and the SPK use the term "own national[s]" eighteen times in their Petition; they use the term "own borders" nine.

German control—Jews principally among them—were presumptively acts of confiscation and subject to return. Military Government Law No. 59, Restitution of Identifiable Property (passed November 29, 1947). The burden "on the merits," as Germany would put it, is on *Germany* to prove the validity of this transaction. Germany and the SPK cannot hope to do so, so they seek to avoid the conversation entirely.

Defendants' argument boils down to their simple belief that there should be no liability for property taken in violation of international law. Seventy years of American law—and Congress—say otherwise. The United States always intended that Holocaust victims and their heirs could seek justice for property crimes in our courts. On April 27, 1949, the State Department issued Press Release No. 296 entitled "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers," which stated (emphasis added):

> The letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that *the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their*

> *jurisdiction to pass upon the validity of the acts of Nazi officials*.

Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954) (quoting Press Release No. 296 and holding: "In view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question.").

In 1998, Congress passed the Holocaust Victims Redress Act, stating:

> [C]onsistent with the 1907 Hague Convention, *all governments* should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

Pub. L. No. 105–158, 112 Stat. 15 § 202 (1998) (emphasis added). Also in 1998, the United States Department of State organized and hosted the Washington Conference on Holocaust Era Assets. This led to the Washington Conference Principles on Nazi-Confiscated Art, an international commitment to providing a path to justice for Holocaust victims and their heirs. Supp. App. 65–67.

During the pendency of this case, Congress passed the Holocaust Expropriated Art Recovery ("HEAR")

Act. Pub. L. No. 114–308, 130 Stat. 1524, § 5 (2016). Supp. App. 177-84. This statute expands the ability of Holocaust victims and their heirs to bring suit in U.S. courts. Germany and the SPK do not even mention this controlling statute in their discussion of U.S. policy—a material omission that should condemn their petition without any further consideration. *See United States v. Dinh*, 920 F.3d 307, 311 n.4 (5th Cir. 2019) ("We are troubled by the fact that" the party's filing "does not attempt to distinguish *Chapman*, nor even acknowledge it as adverse authority which this court should be aware of when considering this argument.").

The present suit is perfectly in line with decades of United States policy. There is no need to review the correct decision below.

II. Factual Background

"[T]he Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups." HEAR Act, Pub. L. No. 114–308, 130 Stat. 1524, § 2(1) (2016). Forty-two of those works of art, uniquely coveted by the German state, are the subject of this case.

In 1929, a group of Jewish art dealers (collectively, the "Consortium") joined together to purchase the Welfenschatz, a collection of over eighty pieces of medieval reliquary art. Supp. App. 2; 18. In the early 1930s, the Consortium sold some pieces from the

Welfenschatz to international buyers, but they could not finish their project before 1933, when the Holocaust began. Supp. App. 24–25; 27–31.

The Nazis viewed the Welfenschatz as an Aryan treasure, and they were disgusted that it was held by Jews. Nearly as soon as they rose to power, the Nazis began scheming about how to coerce the Consortium into relinquishing the Welfenschatz for a fraction of its value. On November 9, 1933, Mayor Friedrich Krebs of Frankfurt wrote directly to Hitler: "According to expert judgment, the purchase is possible *at around 1/3 of its earlier value*. . . . I therefore request that you, as Führer of the German people, create the legal and financial preconditions for the return of the Welfenschatz." Supp. App. 31–33. The Nazis' dual purpose was to obtain the Welfenschatz and to deprive its Jewish owners of their livelihood. When a German museum expressed its own interest in acquiring the Welfenschatz, the Nazis' intermediary exerted pressure to halt those plans—and thereby to end any possibility that the Consortium would be paid fairly for the collection. Supp. App. 53.

By 1935, the Consortium's members had suffered through two years of Nazi terror. Supp. App. 29–31; 47–50; 52. The Consortium conveyed the Welfenschatz under duress, for a fraction of its value, to a bank acting on the Nazis' behalf. Supp. App. 53–54.[2] This was a

[2] The grossly deflated price was not, as Defendants claim, because of general economic conditions. Starting in 1933, Aryan art firms were recovering from the global economic crisis, while the Nazis repressed Jewish art firms. Supp. App. 46–50; 52.

prized trophy. On October 31, 1935, the Baltimore Sun reported that "[t]he bulk of the so-called Guelph Treasure, which was purchased by the Prussian Government," would be "presented to Adolph Hitler as a 'surprise gift.'" Supp. App. 61.

After World War II, the Welfenschatz was transferred to the SPK, an instrumentality of Germany that holds the cultural artifacts of former Prussia. Supp. App. 62. The Welfenschatz sits on prominent display in a Berlin museum. Supp. App. 13. In 2014, the Consortium's heirs participated in a non-binding mediation process before a German committee, the Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property (the "Advisory Commission"). Supp. App. 3; 74–76. The Advisory Commission, which was established in 2003, makes non-binding recommendations to German museums about whether to restitute works by reason of Nazi confiscation. Supp. App. 70–71. The panel has faced well-deserved criticism. Former Ambassador to Austria and current President of the World Jewish Congress Ronald Lauder has said: "No one wants to go to the Commission today because it is not viewed as independent or impartial." In a predetermined conclusion, and against the evidence, the Advisory Commission recommended against restitution of the Welfenschatz. Supp. App. 74–78. The failure of the Advisory Commission *in this very case* led directly to wholesale changes in its flawed structure and composition.

III. Procedural Background

Alan Philipp and Gerald Stiebel, two of the Consortium's heirs, filed their Complaint against Germany and the SPK on February 23, 2015. Jed Leiber, a third heir, joined the lawsuit on January 14, 2016 (these three heirs together are "Plaintiffs"). On March 11, 2016, Germany and the SPK brought a motion to dismiss, which Plaintiffs opposed.

On March 31, 2017, the District Court largely denied the motion to dismiss.[3] App. 35–36. Relevant to this petition, the District Court held that claims of a genocidal taking constituted allegations of "property taken in violation of international law" (28 U.S.C. § 1605(a)(3)) and that this case was therefore properly brought under the expropriation exception to the FSIA. *See* Defendants' Appendix ("App.") 52–58. The District Court further held that Germany and the FSIA could not rely on comity arguments that were outside the grounds for immunity set forth in the FSIA. *See* App. 76–83. In its written decision, the District Court noted: "the Court agrees with Plaintiffs that the HEAR Act supports their argument that U.S. policy does not conflict with Plaintiffs' ability to pursue their claims in this Court." App. 67.

Germany and the SPK appealed, and on July 10, 2018, the D.C. Circuit affirmed both rulings relevant to

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[3] The Court granted the motion to dismiss five non-property-based claims. The Court held that the five remaining claims—declaratory relief, replevin, conversion, unjust enrichment, and bailment (*i.e.*, the core of the claim for restitution)—could proceed.

the present petition.[4] The D.C. Circuit reiterated its holding in *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016) that genocidal takings may "subject a foreign sovereign and its instrumentalities to jurisdiction in the United States where the taking 'amounted to the commission of genocide' . . . . This, we explained, is because '[g]enocide perpetrated by a state,' even 'against its own nationals[,] . . . is a violation of international law.'" App. 7. The D.C. Circuit also rejected Germany's and the SPK's comity-based exhaustion argument. In reaching its conclusion, the D.C. Circuit quoted this Court's holding that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA]'s text. Or it must fall." App. 17 (quoting *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141–42 (2014)). Once again, the D.C. Circuit discussed the HEAR Act, which was a component of the holding. *See* App. 9–10; 13; 24.

Germany and the SPK sought *en banc* review. Their petition was denied on June 18, 2019. App. 96–97.

[4] The D.C. Circuit did instruct the District Court to dismiss Germany as a defendant based on its interpretation of the commercial nexus component of the expropriation exception. That ruling will be the subject of Plaintiffs' conditional cross-petition.

REASONS TO DENY THE PETITION

I. The First Question Presented Does Not Warrant Review.

U.S. courts have jurisdiction over cases involving property taken in violation of international law. Genocidal thefts violate international law. U.S. courts therefore have jurisdiction over genocidal thefts. *Simon*, 812 F.3d at 145. This is evident on the face of the FSIA, and it is consistent with decades-long United States policy to allow Holocaust restitution cases to proceed in our courts.

A. The D.C. Circuit Applied the Plain Text of the FSIA.

Foreign sovereigns are subject to U.S. jurisdiction when "rights in property taken in violation of international law are in issue[.]" 28 U.S.C. § 1605(a)(3). This rule, which is commonly known as the expropriation exception, is not limited to an "international law of takings," as Defendants argue. The expropriation exception does not even mention an international law of takings.

Genocide is the quintessential violation of international law. "All U.S. courts to consider the issue recognize genocide as a violation of customary international law." *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 675 (7th Cir. 2012). At a convention prompted by Germany's own atrocities, the international community affirmed that "genocide, whether committed in time of peace or in time of war, is a crime under international

law[.]" Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), art. 1, Dec. 9, 1948, 78 U.N.T.S. 277. The crimes of genocide include "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part[.]" *Id.* at art. 2(c).

Accordingly, claims for genocidal takings are properly brought under the expropriation exception. In 2012, the Seventh Circuit (on whose law Defendants rely for their comity argument, it bears noting) held that the expropriation exception applied to claims "for property expropriated pursuant to and as an integral part of a widespread campaign to deprive Hungarian Jews of their wealth and to fund genocide, a long-recognized violation of international law." *Abelesz*, 692 F.3d at 667. Four years later, the D.C. Circuit held: "The alleged takings of property in this case amounted to the commission of genocide, and genocide violates international law. The plaintiffs' property therefore was 'taken in violation of international law.'" *Simon*, 812 F.3d at 142; *see also de Csepel v. Republic of Hung.*, 859 F.3d 1094, 1103 (D.C. Cir. 2017). A District Court in the Ninth Circuit has concurred. Where a complaint alleged "that the Ottoman Empire and later the Republic of Turkey stripped ethnic Armenians of their property and that these expropriations were integrally related to the government-sanctioned genocidal policies," the

expropriation exception applied. *Davoyan v. Republic of Turk.*, 116 F. Supp. 3d 1084, 1102 (C.D. Cal. 2013).[5]

This Court recently approved this commonsense conclusion. In *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, this Court affirmed that while domestic takings are usually immune from suit, "there are fair arguments to be made that a sovereign's taking of its own nationals' property sometimes amounts to an expropriation that violates international law, and the expropriation exception provides that the general principle of immunity for these otherwise public acts should give way." 137 S. Ct. 1312, 1321 (2017). In that case, this Court considered what burden a plaintiff must meet in expropriation cases "where a 'violation of international law,' while a jurisdictional prerequisite, is *not* an element of the claim to be decided on the merits?" *Id.* at 1323. This Court cited *Simon*, 812 F.3d 127, *de Csepel v. Hung.*, 169 F. Supp. 3d 143 (D.D.C. 2016), and the present case as examples of this circumstance. *Id.*

Germany and the SPK ask this Court to reverse course and hold that takings from a country's nationals can *never* satisfy the expropriation exception. If Congress wanted to limit who could bring claims under the expropriation exception, it could have done so, as it did with the terrorism exception to sovereign immunity. 28 U.S.C. § 1605A(a)(2)(A)(ii) (claimants or victims

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[5] Germany's description of this indisputable crime is telling, referring to it as the "*allegedly* genocidal takings by the Ottoman Empire from ethnic Armenians." Petition at 25 (emphasis added).

must have been, *e.g.*, United States nationals). Germany and the SPK mistakenly rely on the domestic takings rule, which "manifests the broader reluctance of nations to involve themselves in the domestic politics of other sovereigns." *Simon*, 812 F.3d at 144.[6] There is no such deference when a state commits the international crime of genocide. *Id.* at 144–45; *see also Helmerich*, 137 S. Ct. at 1321. The international community agrees: "International law recognizes a state's jurisdiction to prescribe law with respect to certain offenses of universal concern, such as genocide . . . even if no specific connection exists between the state and the persons or conduct being regulated." RESTATEMENT (FOURTH) OF FOREIGN RELATIONS: SELECTED TOPICS IN TREATIES, JURISDICTION, AND SOVEREIGN IMMUNITY, § 413 (2018) [hereinafter RESTATEMENT (FOURTH)]. As the Seventh Circuit held: "The international norm against genocide is specific, universal, and obligatory. Where international law universally condemns the ends, we do not believe the domestic takings rule can be used to require courts to turn a blind eye to the

[6] In support of the domestic takings rule, Defendants repeatedly rely on Justice Breyer's concurrence in *Altmann*: "*if* the lower courts are correct in their consensus view that [the expropriation exception] does not cover expropriations of property belonging to a country's own nationals." *Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004) (concurrence) (cited at Petition, 3 and 15) (emphasis added). Justice Breyer later authored the *Helmerich* decision discussed above, of course, mooting the *Altmann* comments.

means used to carry out those ends[.]" *Abelesz*, 692 F.3d at 676.[7]

In particular (and not contested below on appeal in this case), the expropriation exception applies to genocidal takings of art. *See de Csepel*, 859 F.3d at 1103. It is well-established that the Nazis' long history of appropriating art was part of the Holocaust. In 1998, Congress acknowledged: "The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide," and "the same international legal principles applied among the states should be applied to art and other assets stolen from the victims of the Holocaust." Holocaust Victims Redress Act, Pub. L. No. 105–158, 112 Stat. 15, § 201(4)–(5) (1998). Again, in the HEAR Act, Congress found: "the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups." Pub. L. No. 114–308, 130 Stat. 1524, § 2(1). It is also well-established that takings include forced sales, such as the sham transaction at issue in this case. App. 10–11 ("For purposes of this appeal, however, Germany concedes that the forced sale qualifies as a 'tak[ing],' and it offers no reason why a taking by forced sale cannot qualify as a genocidal taking. Indeed, the heirs' allegations . . . support just that conclusion.") (internal record citations

[7] The Eleventh Circuit indicated that it agreed with this reasoning while finding other facts distinguishable. *Mezerhane v. República Bolivariana De Venez.*, 785 F.3d 545, 551 (11th Cir. 2015).

omitted); *see also*, *e.g.*, *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1023, 1027 (9th Cir. 2010) (Nazi-appointed Jakob "Scheidwimmer refused to allow [Lilly Cassirer] to take the painting out of Germany and demanded that she hand it over to him for approximately $360"; "On appeal, neither Spain nor the Foundation contends that Germany's actions with respect to the painting were not a taking in violation of international law.").

B. *Certiorari* Is Unnecessary When This Interpretation Is Consistent With Recent Congressional Action and U.S. Policy.

In early 2016, the D.C. Circuit held that genocidal thefts are within the expropriation exception; such thefts therefore expose foreign sovereigns to the jurisdiction of United States courts. *Simon*, 812 F.3d 127. Nearly a year later, in December of 2016, Congress passed the HEAR Act, which facilitates U.S. litigation to recover art lost during the Holocaust. If Congress did not want to subject sovereigns to Holocaust restitution suits, it would have drafted its law accordingly. Instead, it passed a law explicitly to open the door wider to Holocaust victims and their heirs.

When the HEAR Act was passed, it was not a matter of debate whether sovereign states would be defendants in Holocaust art restitution cases; it was already happening. In 2004, with *Altmann*, this Court allowed a lawsuit against Austria regarding a Holocaust-era art theft to proceed. 541 U.S. 677. In

2011, the Court denied *certiorari* when the Ninth Circuit held that it had jurisdiction over Spain regarding a Holocaust-era art theft. *Cassirer*, 616 F.3d 1019, *cert. denied*, 564 U.S. 1037 (June 27, 2011). In 2016, as the HEAR Act was being considered, two additional art expropriation cases regarding the Holocaust were pending against sovereign nations: the present case and *de Csepel*. Both cases depended on applying the expropriation exception to a sovereign's genocidal thefts (including those by Hungary against people "within its own territory," as Germany would put it). *See de Csepel*, 169 F. Supp. 3d at 164 ("The Court therefore finds that the forty-two paintings that were indisputably seized by the Nazis and Hungary during World War II were 'taken in violation of international law.' "). Yet against this history Congress not only let *Simon* stand, but bolstered cases like it. The HEAR Act manifests Congress's intention to provide paths to relief for Holocaust victims and their heirs.

It bears noting that the amicus brief of the United States, referred to elsewhere in Germany and the SPK's petition, is silent on the expropriation exception. Petition, 31. Although Germany and the SPK sought rehearing regarding both the expropriation exception and the comity issues, the United States pointedly advocated for rehearing on *only* the comity issue, which as discussed below even if applied to this case would not change the result (and thus presents no basis to

grant *certiorari*). That silence[8] underscores that this is not a legal issue that merits this Court's attention.

C. *Certiorari* Is Unnecessary When the Decision Below Is Consistent With Long-standing Foreign Policy Regarding Property Crimes of the Holocaust.

With feigned concern, Defendants protest a result that allows a plaintiff to seek recovery for theft but not for loss of life. Allowing property claims to proceed is entirely consistent with this country's historic approach to Holocaust justice and with Congress's approach to the FSIA, however. Since it defeated Germany, this country's work on Holocaust justice has focused on property crimes. Military Government Law No. 59 addressed property restitution. The State Department's Press Release No. 296 of April 27, 1949 addressed jurisdiction for suits regarding identifiable property. *Bernstein*, 210 F.2d at 376. In 1998, the Holocaust Victims Redress Act and the Washington Conference on Holocaust Era Assets both addressed property. In 2016, the HEAR Act likewise addressed lost and stolen art.

For decades, the United States has led the international community in providing restitution for

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[8] Germany and the SPK reference a brief that then-Deputy Assistant Attorney General Gregory G. Katsas filed in 2006 in *Garb v. Republic of Pol.*, 440 F.3d 579 (2d Cir. 2006) (cited at Petition, 5; 16). The amicus brief filed by the United States in this case could easily have adopted now-Judge Katsas's view, but it did not.

property crimes of the Holocaust. Defendants have no grounds, or standing, to attack this country's clear and longstanding policy of helping Holocaust victims obtain restitution of their belongings.

The FSIA is inevitably a compromise, and the balance it strikes is a matter for Congress. As the Seventh Circuit found: "We acknowledge that the fact that plaintiffs can seek compensation for taken property but not for taken lives seems anomalous. That anomaly, however, is the product of the statutory limits of the FSIA." *Abelesz*, 692 F.3d at 677. In deciding *Simon*, the D.C. Circuit agreed with the Seventh Circuit. It explained:

> We recognize one seeming anomaly, also noted by the Seventh Circuit in addressing parallel claims arising from the Hungarian Holocaust: that the FSIA scheme, as we construe it, enables the plaintiffs to "seek compensation for taken property but not for taken lives." But that is a byproduct of the particular way in which Congress fashioned each of the various FSIA exceptions. . . . The unavailability of jurisdiction for personal-injury claims under a different, independent exception affords no reason to deny jurisdiction for property-related claims fitting squarely within the terms of the expropriation exception.

Simon, 812 F.3d at 146.

Germany and the SPK ask this Court to reverse *Simon*'s well-reasoned decision. This would not merely affect the claims of the Consortium, whom the

Defendants have repeatedly denigrated for not having suffered dramatically *enough* as Jews in Nazi Germany. Defendants also ask this Court to reverse the holding of cases "where"—in Defendants' own words—"Holocaust victims claim seizures of their last remaining possessions as they were being transported to death camps in 1944–45." Petition, 26 (referencing *Abelesz*, *Fischer v. Magyar Allamvasutak Zrt*, 777 F.3d 847 (7th Cir. 2015), and *Simon*).

D. Defendants' Arguments Attack the FSIA Itself.

Germany and the SPK have little basis to contest the D.C. Circuit's ruling, which followed a prior decision by the Seventh Circuit, and which applied the plain language of the expropriation exception. Instead, Germany and the SPK argue that the FSIA itself goes too far. Their dislike of the FSIA is not a basis for *certiorari*.

Appellants' antipathy to the FSIA pervades their brief. In their introduction, they argue: "No other nation has an expropriation exception to sovereign immunity." Petition, 2. The argument comes too late; the expropriation exception is law. They write longingly of "the restrictive theory of sovereign immunity—followed by nearly all other states and established as customary international law[.]." *Id.* The point, of course, is that this rule is "followed by . . . *other* states." Germany and the SPK acknowledge that the FSIA's expropriation exception departs from the restrictive theory.

Petition, 14. Even when the United States did advance the restrictive theory, its proponent was Assistant Secretary of State Jack B. Tate, who also wrote that "[t]he policy of the Executive, with respect to claims asserted in the United States for restitution of such property [seized during the Holocaust], is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." *Bernstein*, 210 F.2d at 376. Defendants warn of "the dangers of U.S. courts adjudicating extraterritorial disputes involving injury to foreign parties outside the U.S." (Petition at 5), but that is a "danger" that Congress already accepted. Disagreeing with Congress, Defendants ask this Court to interpret the expropriation exception nearly out of existence.

The dissent below, which Defendants urge this Court to consider, also targets the FSIA itself. The dissent argues that there are only four internationally-approved exceptions to sovereign immunity: "claims arising out of commercial activity; torts causing injuries within the foreign state; property claims involving commercial activities, gifts, or immovable property in the forum state; and waiver." App. 105 (internal citations to the RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 451 (1987) [hereinafter RESTATEMENT (THIRD)] (1987) omitted). Congress already determined to expand the FSIA beyond those four claims, including not only the expropriation exception, but also a terrorism exception, which applies even to actions that occur in the territory of the defendant sovereign. 28 U.S.C. § 1605A. Relying on the dissent, the Defendants may

wish that the expropriation and terrorism exceptions were removed from the FSIA, but they cannot expect the courts to unravel a duly passed law.

E. Restraints Already in Place Assure That the Decision Below Will Not Open Floodgates.

As part of their argument against the plain text of the FSIA, Germany and the SPK argue that the law will open the floodgates to plaintiffs seeking justice. The concern is not only a dispute with the FSIA itself, but it is hyperbolic. As the Ninth Circuit has held regarding another argument about FSIA interpretation: "[J]urisdictional boundaries are for Congress to set, not for courts to write around. This said, restraints are in place that deflect the risk. The FSIA is purely jurisdictional; it doesn't speak to the merits or to possible defenses that may be raised to cut off stale claims or curtail liability." *Cassirer*, 616 F.3d at 1031.

This Court has already taken two steps to ensure meaningful restraints for cases brought under the expropriation exception. Decades ago, the Court explained that "a court should decide the foreign sovereign's immunity defense '[a]t the threshold' of the action." *Helmerich*, 137 S. Ct. at 1324 (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983)). The expropriation exception, which requires a plaintiff to show both a taking in violation of international law and a commercial nexus with the United States, applies to very few cases. Many defendants will

defeat an action at its commencement. Because sovereign immunity is decided at the threshold of an action, Plaintiffs have waited nearly five years now for their case even to begin while the SPK and Germany asserted sovereign defenses.

Recently, this Court added a further restraint by setting a high burden for plaintiffs seeking jurisdiction on the basis of an international law violation that is distinct from the cause of action. This Court held:

> Where . . . the facts are not in dispute, those facts bring the case within the scope of the expropriation exception only if they do show (and not just arguably show) a taking of property in violation of international law. Simply making a nonfrivolous argument to that effect is not sufficient.

Id.

Sovereigns are also shielded by common defenses. As Justice Breyer explained in his *Altmann* concurrence: "statutes of limitations, personal jurisdiction and venue requirements, and the doctrine of *forum non conveniens* will limit the number of suits brought in American courts." 541 U.S. at 713. With these many safeguards (to many of which Defendants have already availed themselves in this case) in place, there is no meaningful risk of opening any floodgates.

F. This Case Is Not an Appropriate Vehicle for Review.

Certiorari is unnecessary because United States courts would have jurisdiction even under the narrow version of the expropriation exception that Defendants ask this Court to adopt. Defendants argue that the expropriation exception is limited to violations of a specific international law of takings—a law that, despite Defendants' claim that it is central to the FSIA, is not even mentioned in the current RESTATEMENT (FOURTH).[9] Much of Defendants' cited support for this law actually addresses the domestic takings rule or the act of state doctrine (which are inapplicable for the reasons discussed above), not any international law of takings. Even under that narrow reading, however, jurisdiction here would be proper. The previous RESTATEMENT (THIRD) provided:

> A state is responsible under international law for injury resulting from:
>
> (1) a taking by the state of the property of a national of another state that
>
> (a) is not for a public purpose, or
>
> (b) is discriminatory, or
>
> (c) is not accompanied by provision for just compensation[.]

RESTATEMENT (THIRD), § 712.

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[9] *Compare* RESTATEMENT (THIRD), § 712 *and* RESTATEMENT (FOURTH), which ends with section 490, and does not contain the cited language.

In the context of the Holocaust, the question is not whether the victims were nationals of other states, but whether they were actually recognized as citizens of their own country. *See Cassirer*, 616 F.3d at 1023 n.2 (taking by Germany, during the Holocaust, was within the expropriation exception where Jewish victim "Lilly [Cassirer] was no longer regarded by Germany as a German citizen[.]").[10]

By 1935, the Consortium were long since no longer regarded or treated as Germans. As soon as Hitler rose to power, Nazis began stripping the Jewish population of their rights. This is why the presumption of confiscation in Military Government Law No. 59 begins on January 30, 1933, the very day Hitler became Chancellor. The Nazis did not wait. In 1933, the year of Hitler's ascendency, the concentration camps of Dachau and Osthofen opened, and murders there went unprosecuted. Supp. App. 29. The Nazi regime implemented targeted methods to destroy the Jewish middle class—people like the Consortium. Supp. App. 29–30; 40; 46–50; 52. In early 1933, just weeks after Hitler's ascension to power, Minister for Propaganda and Education Joseph Goebbels organized a boycott of Jewish businesses, and these state-encouraged boycotts spread throughout the country. Supp. App. 46. Goebbels then founded the Reich Chamber of Culture, which assumed total control over cultural trade; only its members were allowed to conduct business. It excluded Jews, making

[10] Plaintiffs acknowledge that the Federal courts have reached different conclusions on this issue. *See Abelesz*, 692 F.3d at 676 n.6 (citing cases on both sides of the issue).

it impossible for Jewish art dealers to work. Without any legal means of sale, major dealers' collections were liquidated. Supp. App. 46. By the time of the forced sale of the Welfenschatz, in 1935, Germany had stripped the Consortium members of the rights they once had as German citizens. *See also*, *e.g.*, Supp. App. 47–52.

The other elements of this rule are easily met. The taking was plainly discriminatory: throughout Nazi Germany, Jews were the victims of bald thefts and forced sales. The taking served no legitimate public purpose: the Welfenschatz was a trophy of one more conquest over the Jews. And the taking was not accompanied by just compensation: by design, the Nazis paid only a fraction of the collection's true value. Where jurisdiction would be proper even under a narrower understanding of the expropriation exception, there is no need for *certiorari*.

II. The Second Question Presented Does Not Warrant Review.

A. A Decision That Followed the FSIA and This Court's Precedent Does Not Merit *Certiorari*.

Prior to the FSIA, courts evaluating comity-based defenses faced the task of evaluating the political concerns and international norms present in particular cases. *See Verlinden*, 461 U.S. at 487 (providing a historical overview). This Court has explained:

> Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive,

> loosely common-law-based immunity regime with the Foreign Sovereign Immunities Act's "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." The key word there—which goes a long way toward deciding this case—is *comprehensive*.

NML Capital, 573 U.S. at 141 (quoting *Verlinden*, 461 U.S. at 488). *See also id.* at 141–42 ("any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.").

This *certiorari* petition concerns a quintessential immunity defense: Defendants' argument that the case should be dismissed because of their wish *as sovereign parties* to resolve disputes against them in their own courts. *See Philipp v. F.R.G.*, 894 F.3d 406, 416 (D.C. Cir. 2018) ("Germany protests that, as a 'staunch U.S. ally,' it 'deserves the chance to address [the heirs'] attacks' in its own courts."). Yet the expropriation exception to the FSIA contains no exhaustion requirement. *Compare* 28 U.S.C. § 1605(a)(3) (expropriation exception, containing no exhaustion requirement) *with* 28 U.S.C. § 1605A(a)(2)(A)(iii) (terrorism exception, containing an arbitration exhaustion requirement); *see also Fischer*, 777 F.3d at 854 ("We rejected the statutory exhaustion argument, finding that nothing in the language of the FSIA expropriation exception suggests that plaintiffs must exhaust domestic remedies before resorting to United States courts. In so doing, we joined the Ninth and D.C. Circuits.") (internal citations omitted). Defendants' "immunity defense . . . must fall."

Defendants ask to avoid the FSIA by misclassifying prudential exhaustion as something other than an immunity defense. Defendants seek to use prudential exhaustion to secure immunity, and their proposed doctrine would generally have that effect. Once a plaintiff pursued remedies in the defendant's courts, the defendant could assert *res judicata* as a defense to an American suit. As the D.C. Circuit recently explained in a similar case against Hungary:

> [T]here is a substantial risk that the Survivors' exhaustion of any Hungarian remedy could preclude them by operation of *res judicata* from ever bringing their claims in the United States. . . . So understood, enforcing what Hungary calls "prudential exhaustion" would in actuality amount to a judicial grant of immunity from jurisdiction in United States courts. But the FSIA admits of no such bar.

Simon v. Republic of Hung., 911 F.3d 1172, 1180 (D.C. Cir. 2018).

When the Court of Appeals ruled against the Defendants' prudential exhaustion argument, it did nothing more than apply a federal statute that sets forth the rules and limits of sovereign immunity, together with Supreme Court precedent clarifying that the statute is comprehensive.

B. One Circuit Misreading the Restatement Does Not Warrant *Certiorari*.

1. The Seventh Circuit's Error Does Not Justify Review of a D.C. Circuit Decision.

Defendants rely extensively on a Seventh Circuit misreading of a section of the RESTATEMENT (THIRD). In *Fischer*, the Seventh Circuit held that norms of international law required plaintiffs to exhaust remedies in Hungary before suing an instrumentality of Hungary in a U.S. court. 777 F.3d 847. In reaching that conclusion, the Seventh Circuit relied on a comment in the RESTATEMENT (THIRD) that actually compels the opposite result: "Under international law, ordinarily a state is not required to consider a claim ***by another state*** for an injury to its national until that person has exhausted domestic remedies[.]" RESTATEMENT (THIRD), § 713, cmt. f. (emphasis added) (as discussed below, this comment also sets forth several exceptions). By its own words, this exhaustion requirement applies only when one state sues another on behalf of its citizen. *See Marik v. Powell*, 15 Fed. App'x 517, 518 (9th Cir. 2001) ("in espousing a claim a sovereign takes the claim on as its own"). Somehow, the Seventh Circuit concluded that the exhaustion requirement could be used *against* private plaintiffs.

As the D.C. Circuit explained in *Agudas Chasidei Chabad v. Russian Fed'n*, however, the RESTATEMENT (THIRD) provision at issue "addresses claims of one state against another," and it aims at avoiding "a procedure as full of potential tension as nation vs. nation

litigation[.]" 528 F.3d 934, 949 (D.C. Cir. 2008). The RESTATEMENT (FOURTH) observed that *Fischer* "add[ed] a substantive requirement for jurisdiction that is not supported by the statute or its legislative history." § 455, Reporter's Note 11. There is no need to grant *certiorari* when the purported circuit split arose from a misreading of the Restatement. Nor is there a need to grant *certiorari* to address the D.C. Circuit's correct understanding of the relevant doctrines.

2. Any Circuit Split Is Resolving.

Any division in the circuits is shrinking. Just this year, the First Circuit explained that, when one of the FSIA's exceptions to foreign immunity applies, there is no remaining justification to dismiss a suit on comity grounds. Considering a suit brought under the commercial activity exception, the First Circuit held:

> As Canada rightly points out, the "FSIA's objective is to give protection from the inconvenience of suit as a gesture of comity." . . . But, by including the "commercial activity" exception in the FSIA, Congress made clear that those concerns do not provide a reason to extend that protection to foreign states with respect to a suit that the "commercial activity" exception encompasses.

Merlini v. Canada, 926 F.3d 21, 38 (1st Cir. 2019) (finding Canada not immune from suit). Any circuit split is being addressed at the circuit level. There is no crisis that requires intervention.

C. There Is No Novel Holding.

Defendants claim that the D.C. Circuit set forth a "new national rule" (Petition, 5; 13) when it held that Defendants could not assert a prudential exhaustion defense in this FSIA action. What is novel is the rule that Germany and the SPK seek to create to ignore the text of the FSIA.

In 2008, the D.C. Circuit considered a Jewish organization's suit to recover religious texts that Russian agents had seized. *Chabad*, 528 F.3d 934. Russia argued that certain claims failed because the plaintiff had not exhausted remedies in Russia. *Id.* at 948. The court disagreed, finding that the District Court's holding that the plaintiff "was not required to exhaust Russian remedies before litigating in the United States" was "likely correct[.]" *Id.* at 948. Although the court did not rule definitively (any exhaustion requirement would not have applied to the facts of the case), it offered a thoughtful and reasoned response to Russia's arguments, staking out the D.C. Circuit's approach to prudential exhaustion in the FSIA context.

In the years after *Chabad*, courts in the D.C. Circuit have ruled against any prudential exhaustion requirement in the FSIA context. In *de Csepel*, the District Court held that prudential exhaustion applies only "where one state has adopted the claim of its national and is opposing another state in litigation." 169 F. Supp. 3d at 169. The District Court considering this case, and later the Court of Appeals, reached the same conclusion. *Philipp*, 894 F.3d at 415–16; *Philipp v. Fed.*

Republic of Germany, 248 F. Supp. 3d 59, 81–83 (D.D.C. 2017). When the District Court reached a contrary conclusion in *Simon*, it was reversed on appeal. *Simon*, 911 F.3d at 1181.

In this case, the D.C. Circuit did not establish any novel holding. It merely, and properly, applied the circuit's longstanding understanding of the comity doctrine.

D. The Amicus Brief Does Not Provide a Justification for *Certiorari*.

Germany and the SPK rely on an amicus brief in support of rehearing *en banc* filed below by the United States. The U.S. wrote "to express its view that a district court may, in an appropriate case, abstain on international comity grounds from exercising jurisdiction over claims brought under the expropriation exception[.]" App. 125–26. The United States did *not* indicate that this was an appropriate case for abstention, only that it *could* be considered. Considering a materially similar brief filed by the United States in *Simon v. Republic of Hungary*, No. 17–7146 (D.C. Cir. June 1, 2017), the D.C. Circuit found the position "flatly inconsistent with *NML Capital*," and concluded that "nothing in the government's brief alters our conclusion that the [Holocaust victim] heirs have no obligation to exhaust their remedies in Germany." App. 20.

Moreover, the amicus brief references the comity defense in connection with the separate doctrine of *forum non conveniens*, a defense that Defendants

asserted, the District Court rejected, and Defendants elected not to appeal. App. 128; 133. The reference to *forum non conveniens* highlights why the prudential exhaustion defense is not actually necessary: when defendants have meritorious forum arguments—and these do not—they will accomplish the same ends through that doctrine. Because *forum non conveniens* is equally available to sovereign and non-sovereign defendants, it remains available in FSIA cases. *See* 28 U.S.C. § 1606. This doctrine also allows a court to consider public factors, which the United States and the Defendants urge as so important. *See Pain v. United Tech. Corp.*, 637 F.2d 775, 791–92 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). At the same time, *forum non conveniens* also encourages courts to consider respect for the plaintiffs' choice of forum, which is necessary for the FSIA to remain a law in reality, and not merely on paper.

The United States' reliance on *Republic of Philippines v. Pimentel* is misplaced. 553 U.S. 851 (2008). In that case, the Court held that the FSIA did provide the sovereign state with immunity. The Court then considered comity concerns in the context of determining whether the case could proceed *without* the sovereign party under Fed. R. Civ. P. 19(b). That case provides no support for a sovereign that is subject to jurisdiction under the FSIA, and that seeks a backdoor way out of litigation.

E. Defendants' Attempt to Cast Prudential Exhaustion as a Non-Sovereign Defense Does Not Merit Consideration.

Defendants insist that they are entitled to try these claims in their own courts precisely by virtue of their sovereign status. *See*, *e.g.*, App. 20 ("Germany protests that, as a 'staunch U.S. ally,' it 'deserves the chance to address [the heirs'] attacks' in its own courts.").[11] They abruptly change course when trying to salvage the defense from FSIA preclusion. Relying on a provision that sovereign defendants are "liable in the same manner and to the same extent as a private individual under like circumstances" (28 U.S.C. § 1606), Defendants try to cast prudential exhaustion as a pedestrian defense and draw a false equivalency between the FSIA and the Alien Tort Statute ("ATS"). An argument that distorts Defendants' actual defense, and wrongly conflates two different statutes, does not merit *certiorari*.

Contrary to Defendants' portrayal, prudential exhaustion is not a commonly-accepted defense. "Absent true conflicts, a judgment from a foreign court, or parallel proceedings in a foreign forum, rarely have United States courts abstained from deciding the merits of a case on international comity grounds." *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393 (3d Cir. 2006). Although some courts have dismissed cases

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[11] *See also*, *e.g.*, Petition, 31–32 ("Comity lets courts avoid trampling on foreign sovereigns' 'unique interest in resolving' disputes about their own actions within their own borders affecting their own nationals").

in deference to a hypothetical, future proceeding, this approach is not universal. The Third Circuit noted: "We remain skeptical of this broad application of the international comity doctrine, noting our 'virtually unflagging obligation' to exercise the jurisdiction granted to us, which is not diminished simply because foreign relations might be involved[.]" *Id.* at 394 (internal citations omitted) (quoting *Col. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

Defendants rely on cases regarding the ATS, but the ATS and the FSIA are not "like circumstances," and their comity jurisprudence cannot be treated as interchangeable.[12] Unlike the FSIA, the ATS does not contain any directives about the treatment of sovereign states. Some courts have therefore considered common law when evaluating comity-related issues. There is no place for common law guidance regarding the FSIA, because "the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *NML Capital*, 573 U.S. at 141 (quoting *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010)).

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[12] *See* RESTATEMENT (FOURTH), § 424, Reporter's Note 10 ("For claims brought under the ATS, an exhaustion requirement might rest on the authority of the federal courts to fashion a federal-common-law cause of action. . . . No similar authority supports applying a doctrine of prudential exhaustion to international law claims under the Foreign Sovereign Immunities Act or more generally.").

With the FSIA, Congress "abated the bedlam" of an "executive-driven, factor-intensive, loosely common-law-based immunity regime[.]" *NML Capital*, 573 U.S. at 141. Permitting common law comity arguments would undo that careful work. As the Ninth Circuit explained: "Beyond the question of true conflict, courts have struggled to apply a consistent set of factors in their comity analyses. As one commentator has observed, because there is 'no clear analytical framework for its exercise, . . . courts have been left to cobble together their own approach to [international comity].'" *Mujica v. AirScan Inc.*, 771 F.3d 580, 603 (9th Cir. 2014). This approach, which includes factors such as "the foreign policy interests of the United States" and "any public policy interests" (*id.* at 604), closely mirrors the "factor-intensive" immunity regime that prevailed (and confused) before Congress ended it. Reintroducing a "cobble[d] together," multi-factor test would undo the very purpose of the FSIA.

Since 1976, the FSIA has fully encapsulated the comity defenses available to foreign sovereigns. Germany and the SPK raise various policy-based arguments regarding a prudential exhaustion requirement for the FSIA, but as this Court has stated: "These apprehensions are better directed to that branch of government with authority to amend the Act—which, as it happens, is the same branch that forced [the courts'] retirement from the immunity-by-factor-balancing business nearly 40 years ago." *NML Capital, Ltd.*, 573 U.S. at 146.

F. This Case Is Not a Suitable Vehicle Because These Defendants Could Not Invoke Prudential Exhaustion.

Even if this Court were generally inclined to consider whether prudential exhaustion may be invoked in FSIA cases, there would be no reason to review this case because the outcome would not change. Plaintiffs have already pursued the only poor option available to them in Germany: the non-binding Advisory Commission. The Advisory Commission ignored the evidence and rebuffed Plaintiffs' request. Defendants' insistence that Plaintiffs should have kept jumping through German hoops is unfair and punitive. It is also inconsistent with the law. Exhaustion of local remedies is not required when "such remedies are clearly sham or inadequate, or their application is unreasonably prolonged." RESTATEMENT (THIRD), § 713 cmt. f. Additionally, "There is no need to exhaust local remedies when the claim is for injury for which the respondent state firmly denies responsibility[.]" *Id.* Both exceptions apply to this case, so prudential exhaustion—even if applicable—would not be a basis for dismissal. ATS jurisprudence, which Defendants are so eager to claim, provides additional reasons why exhaustion is not appropriate in every case. There is no need for *certiorari* where a different legal ruling would make no practical difference to the case.

1. Plaintiffs Did Pursue the Only Local Option.

Plaintiffs cannot sue in Germany (see below), so they sought mediation before the non-binding Advisory Commission, which Defendants have described as "the mechanism established by Germany under the Washington Principles to hear such disputes." *Philipp v. Fed. Republic of Germany*, Brief for Appellants, 46 (D.C. Cir. Dec. 1, 2017). The Advisory Commission recommended against restitution. When convenient, Defendants are quick to emphasize this previous proceeding, asserting: "Plaintiffs had their chance to present their claims on the merits[13] before the Advisory Commission." *Id.* at 56. As Defendants acknowledge, Plaintiffs have already pursued the local mechanism available to them.

2. Exhaustion Is Not Required When, as Here, it Would Be Fruitless.

Plaintiffs can expect no further redress in Germany, and if they had tried, the attempt would have been fruitless. As Dr. Stephan Meder of the University of Hanover explained in an expert opinion submitted in this case, German courts cannot be relied upon for claims of restitution of moveable personal property. Supp. App. 133-40. He wrote that "the matter of

[13] Describing the Advisory Commission as a resolution "on the merits" is not true. The Advisory Commission makes recommendations to Germany state museums, which that museum has no legal compulsion to follow. Supp. App. 70–71 (First Amended Complaint at ¶ 205).

asserting and enforcing these claims in Germany before German courts must be at best affirmed theoretically . . . but is de facto excluded from a practical point of view." Supp. App. 134. He explained: "[T]he laws applicable in Germany . . . contain notification deadlines that have long-since expired." Supp. App. 136. "The plaintiffs would therefore be excluded from asserting claims in connection with the 'Welfenschatz' collection, to the extent that they were to invoke the special laws on restitution and reparations of Nazi infractions." Supp. App. 137. Claims under the German Civil Code would not fare any better. "The German Supreme Court . . . ruled—without this legal precedent having been reversed to the present day—that the restitution laws conclusively settle the seizure cases based on persecution actions by the Nazi regime, and that therefore restitution claims based on general civil law . . . are therefore categorically excluded." Supp. App. 139. Because litigation abroad would be fruitless, and because Plaintiffs (including U.S. citizens) would be deprived of their HEAR Act rights in Germany, any exhaustion requirement would not apply to this case.

Defendants' own expert concedes the point. Despite what Defendants tell the Court about the *Sachs* case, Jan Thiessen acknowledges that the discussion of the statute of limitations on Holocaust-era claims in *Sachs* was "obiter dictum." Further, the *Sachs* court itself "expressly" "declined to rule broadly on whether plaintiffs in all cases involving National Socialist expropriated property." According to Mr. Thiessen, the case received a "critical reception in German legal

literature" and has not been relied on since. In other words, the hope of a claim in Germany is at best speculative, that is, not actually available to Plaintiffs. It does not support *certiorari*.

3. Exhaustion Is Not Required When, as Here, the Sovereign Denies Wrongdoing.

The RESTATEMENT (THIRD) provides: "There is no need to exhaust local remedies when the claim is for an injury for which the respondent state firmly denies responsibility, for example a claim for injury due to the shooting down of a foreign commercial aircraft where the respondent state contends that the act was justified under international law." § 713 cmt. f. This is such a case.

Defendants have defeated their own exhaustion argument. They proudly acknowledge: "Defendants vigorously dispute Plaintiffs' allegations that the sale of the Welfenschatz was forced, that the sale constituted an expropriation, and that this supposed expropriation violated international human rights law." *Philipp v. F.R.G.*, Petition for Rehearing En Banc, p. 3 n.1 (D.C. Cir. Sept. 7, 2018).[14] Even if Defendants had

[14] This is consistent with Defendants' other submissions. *See*, *e.g.*, *Philipp v. Fed. Republic of Germany*, Defendants' Motion to Dismiss the First Amended Complaint and Incorporated Memorandum of Law, 5 (D.D.C. Mar. 11, 2016) ("This is . . . a case where sophisticated businessmen running a consortium got what they could from a doomed art investment in the midst of the Great Depression.").

a right to assert the defense of prudential exhaustion against individual plaintiffs, their denial of culpability would doom the attempt.

4. There Is No Exhaustion Requirement Where U.S. Interest Is Strong.

Defendants' cited ATS cases provide still more reasons why prudential exhaustion would not apply to this case. Courts are less likely to expect exhaustion where, as here, the allegations concern genocide. *See*, *e.g.*, *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 824 (9th Cir. 2008) ("certain ATS claims are appropriately considered for exhaustion. . . . particularly—but not exclusively—with respect to claims that do not involve matters of 'universal concern.'"); RESTATEMENT (FOURTH), § 413 (genocide is an "offense[] of universal concern[.]"); *see also Mujica*, 771 F.3d at 606. Exhaustion is also less likely to be required where, as here, the plaintiffs include United States citizens. *See*, *e.g.*, *id.* at 604. Even if Defendants had properly raised a prudential exhaustion defense, they would not have prevailed.

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CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court decline the petition for *certiorari*.

Respectfully submitted,

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